(5)

No. 90-655

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FREEPORT-McMORAN INC., *et al.*,
Petitioners,
v.
K N ENERGY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent's brief in opposition is a compelling demonstration of the reasons why certiorari should be granted in this case.

(1). Respondent makes no attempt to defend the holding below—doubtless because that holding so completely conflicts with controlling decisions of this Court it is indefensible.

Instead, respondent argues a case which does not exist. This is rendered transparent by comparing the holding

of which review is sought with respondent's revision of it.

Respondent's brief:

> "The court below did not hold . . . that *Carden* [*v. Arkoma Associates*, 110 S. Ct. 1015 (1990)] overruled the principle that post-commencement events generally do not divest courts of diversity jurisdiction."

(Br. p. 5)

But that is *precisely* what the Tenth Circuit held:

> ". . . although complete diversity was present when the complaint was filed, our inquiry now focuses on whether the addition of a [dispensable] party plaintiff . . . destroys the court's diversity jurisdiction . . . Carden *establishes that* [*the addition of a dispensable party after the action has been commenced*] *destroys the district court's diversity jurisdiction.* Pet. App. pp. 5a, 7a. (emphasis supplied).

Carden, of course, "establishes" no such thing.

The holding below could not be clearer, and it could not be more completely in conflict with the settled jurisdictional rule which this Court announced long ago (*Mollan v. Torrance*, 9 Wheat. 537 (1824)), and to which it has since adhered. *E.g., Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957).

Respondent's wistful assertion (br. pp. 5-6 and n.4) that the court below entered a jurisdictional dismissal of this case on a theory which it never mentioned—the notion that jurisdiction should be reconsidered if a new party asserts a new claim which *only* that party could assert—is, thus, refuted by the very words of the holding below. The Tenth Circuit did not mention the narrow exception which respondent now seeks to inject into its opinion for the very good reason that no new party entered this case asserting a new substantive claim which only that party could possess.

(2). Respondent's assertion that the holding below does not conflict with *Newman-Green, Inc. v. Alfonzo-Larrain*, 109 St. 2218 (1989) because the Tenth Circuit merely decided not to "exercise" its authority to dismiss a dispensable party (br. p. 8) is similarly distorted. The court below did *not* merely decline to exercise this authority. It denied petitioner's *Newman-Green* motion, without comment, as "moot." (pet. app. p. 12).

The motion was plainly not "moot." Granting it would have eliminated the jurisdictional "defect" which the Tenth Circuit (erroneously) believed to exist here.

Respondent offers no justification for this result because none exists.

The importance and substantiality of the holding below cannot be seriously denied. The need for review is indisputable; indeed, it is tellingly shown by respondent's need to rewrite the opinion below in order to defend it.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, certiorari should be granted.

Respectfully submitted,

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